

The claimant obtained additional evidence from Dr. Glenn M. Amundson and again requested medical treatment for his low back. A second preliminary hearing was held on June 19, 2007, and claimant introduced Dr. Amundson's report dated April 8, 2007 as a supplement to the medical evidence introduced at the first preliminary hearing. No additional evidence or testimony was offered. The ALJ again found claimant failed to prove by a preponderance of credible evidence that he injured his low back either from the December 17, 2003 accident or as a natural and probable consequence of that injury. The ALJ noted that claimant testified the accident did not hurt his low back but his medical

experts relied upon the incorrect history that his low back pain started two weeks after the accident. And this inconsistency undermined claimant's credibility and his medical experts' opinions.

The claimant requests review of whether the ALJ erred in finding the claimant's need for medical treatment did not arise out of the work-related injury. Claimant argues Dr. Amundson's opinion corroborates claimant's contention that his low back condition was caused by his December 17, 2003 accidental injury.

Respondent argues the additional medical evidence was the same as the medical evidence submitted to and rejected by the ALJ at the first preliminary hearing. Accordingly, there was no new evidence for the ALJ to consider and his decision should be affirmed. Respondent further argues whether claimant needs additional medical treatment is not a jurisdictional issue subject to review on appeal from a preliminary hearing. Finally, respondent argues that because claimant did not appeal the first preliminary hearing he should be estopped from the instant appeal because this claim has the same issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Initially, respondent argues that whether claimant is entitled to medical treatment for his low back does not raise a jurisdictional issue to appeal from a preliminary hearing. This Board Member disagrees.

An ALJ's preliminary order under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the ALJ exceeded his or her jurisdiction in granting the preliminary hearing benefits.¹ "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."² Whether claimant's medical condition and present need for medical treatment is due to the work-related accident gives rise to an issue of whether claimant's current condition arose out of and in the course of his employment with respondent. Stated another way, this appeal involves a disputed issue of whether the injury arose out of and in the course of claimant's employment. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

¹ K.S.A. 2006 Supp. 44-551(i)(2)(A).

² K.S.A. 44-534a(a)(2).

Respondent next argues claimant should be estopped from this appeal because the same issues had been raised and determined in the first preliminary hearing held on this claim. This Board Member disagrees.

An ALJ is not limited in the number of preliminary hearings that may be held in a case. It is within the sound discretion and authority of the ALJ to determine the number of preliminary hearings to be held and whether a prior preliminary hearing Order should be modified based on the evidence presented. Furthermore, the ALJ has the jurisdiction and authority to amend, modify and/or clarify a preliminary order as the evidence may dictate or as circumstances may require.

A preliminary hearing is a summary proceeding and a decision based upon the evidence presented at such preliminary hearing, whether rendered by an ALJ or the Board upon appeal from a preliminary hearing, is not binding upon the parties but subject to a full hearing on the claim.³ Because new evidence may materially alter the basis for a prior preliminary decision, whether made by an ALJ or the Board, such decisions are subject to change. Consequently, the ALJ had the authority to determine the issues raised at the second preliminary hearing and the Board has the authority to review that decision. Moreover, there was new evidence, Dr. Amundson's report, provided at the second preliminary hearing.

Richard Falbo worked as a laborer/truck driver for the respondent. On December 17, 2003, claimant was helping drill holes on a ledge at a quarry. The drill bit had been pulled from a hole and the drill was being moved. Claimant was walking parallel to the drill when it hit him and knocked him to the ground. Claimant told his supervisor that he had hurt his neck. Claimant went to the hospital and x-rays revealed he had fractured the sixth vertebrae in his neck. Claimant was taken off work for approximately six months.

During that time period an MRI apparently revealed claimant had bone fragments and three herniated disks in his neck. Claimant received an additional six to eight weeks of physical therapy with no improvement so respondent referred him to Dr. Vito J. Carabetta who gave claimant a series of cortisone injections in his neck. Ultimately, Dr. Carabetta released claimant to returned to work on July 1, 2004.

Claimant was placed in an accommodated job working in the lab and he started having increased neck pain as well as low back pain from standing. Claimant returned to Dr. Carabetta but was not provided treatment for his back complaints.

Claimant testified that he never experienced any back pain until at least six months after the accident when he returned to the accommodated job in the lab. And that he told

³ K.S.A. 44-534a(a)(2).

Dr. Randall Hendricks that his back started bothering him two weeks after he returned to work and not two weeks after the accident.

Dr. Hendricks opined claimant's accident aggravated his preexisting spondylolisthesis at L5 but relied upon a history that claimant's low back complaints started two weeks after the accidental injury. And the additional medical records did not indicate claimant was making any complaints regarding back pain, as claimant readily agreed, throughout the approximate six months he was off work and receiving treatment for his neck.

As previously noted, after the first preliminary hearing the ALJ noted claimant stated his low back pain did not start until after two weeks working in his accommodated job in the lab and yet the medical causation opinion of Dr. Hendrick's was based upon the incorrect assumption that the low back complaints started two weeks after the December 17, 2003 accidental injury. The ALJ noted the lack of medical records corroborating either an onset of back pain contemporaneous with either the original injury or upon claimant's return to work while he was still receiving treatment for his neck contradicted claimant's assertion of a work injury.

The claimant then proceeded to obtain an opinion from Dr. Amundson regarding his low back pain. Dr. Amundson reviewed Dr. Hendrick's medical records and noted claimant's onset of low back pain occurred approximately two weeks after the injury at work. Dr. Amundson then specifically noted the December 17, 2003 accident aggravated claimant's preexisting lumbar spondylolisthesis. Dr. Amundson's opinion letter dated April 8, 2007 was introduced at the second preliminary hearing. No additional evidence nor testimony was offered.

The ALJ analyzed, in pertinent part, the additional evidence in the following fashion:

By way of new evidence, the claimant produced a report from Dr. Amundson that said the claimant's lumbar spine condition (lumbar spondylolisthesis) was aggravated by the on-the-job injury. Dr. Amundson's opinion mirrored that of Dr. Hendricks, which was produced at the last hearing, and Amundson's report made many references to Dr. Hendricks' records.

But the problem with the claimant's case has not changed. The claimant testified not that he developed low back pain from the original work injury (fractured cervical vertebra from being struck by a drill steel on December 17, 2003), but rather that his back trouble occurred as the result of accommodated employment, which began six months after the work injury. The claimant's testimony is inconsistent with the medical opinions, and vice-versa. When the claimant presents two different stories about how his low back was hurt on the job, neither story is considered credible. The claimant would have the court ignore his own sworn testimony, which would not be a fair consideration of all the evidence.

Also, at the previous hearing, the respondent produced reports from the claimant's treating physician, Dr. Carabetta, which failed to relate any low back complaints in the relevant time period.⁴

The ALJ again concluded claimant had failed to meet his burden of proof that he suffered injury to his low back as a result of the December 17, 2003 accident or as a direct and natural consequence of that accident. This Board Member agrees and affirms. Moreover, the claimant testified that his low back did not hurt until some six months after the original accident when he was required to stand while performing his accommodated job in the lab. But the contemporaneous medical records neither contain mention of low back complaints after the original accident nor after claimant returned to work at the accommodated job.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated June 20, 2007, is affirmed.

IT IS SO ORDERED.

Dated this 17th day of August 2007.

BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant
David S. Brake, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

⁴ ALJ Order (Jun. 20, 2007) at 1-2.

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2006 Supp. 44-555c(k).